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SUPREME COURT OF LOUISIANA

No. 35,371

STATE OF LOUISIANA

vs.

SINCLAIR REFINING COMPANY.

AL FROM THE NINETEENTH JUDICIAL DISTRICT COURT FOR E PARISH OF EAST BATON ROUGE, NO. 13,757; HONORABLE ARLES A. HOLCOMBE, JUDGE.

TEMENT AS TO THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

he Honorable the Chief Justice Charles A. O'Neill of Supreme Court of the State of Louisiana:

ur petitioner, Sinclair Refining Company, appellant in bove numbered and entitled cause, respectfully shows Honorable Court that the Supreme Court of the United s has the jurisdictional power to hear this case either rect appeal or by writ of certiorari pursuant to the f Congress approved February 13, 1925, c. 229, section Statute 937, wherein Congress amended and reenacted

Section 237 of the Judicial Code so that the pertinent parts thereof now read as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."
>
> "If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed."

Congress has further provided that the writ of error shall be abolished and that all cases in which a writ of error could formerly have been had are now cognizable on appeal. The Act of January 31, 1928, c. 14, section 1-2, 45 Statute 54, reads in part as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtained by appeal."

"Sec. 2. * * * Provided, however, that the review of judgments of State Courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Act 14 of the 2d Extra Session of 1935 of the State of Louisiana, the validity of which was drawn in question, reads as follows:

"Providing additional procedure to facilitate and expedite the determination and trial of all claims by or on behalf of the State for taxes, excises and licenses, and for the penalties, interest and attorney's fees thereon; providing for the summary hearing and determination of such claims by preference in all courts, fixing delays and the burden of proof and the amount of bond for appeals, and repealing inconsistent laws.

"Section 1. Be it enacted by the Legislature of Louisiana: That all proceedings, whether original or by intervention or third opposition, or otherwise, brought by or on behalf of the State, or by or on behalf of any of its officers, for the determination or collection of any tax, excise, license, interest, penalty or attorney's fees, claimed to be due under any statute of this State, shall be summary and shall always be tried or heard by preference, in all courts, original and appellate, whether in or out of term time and either in open court or chambers, at such time as may be fixed by the court, which shall be not less than two nor more than ten days after notice to the defendant or opposing party.

"Section 2. That all defenses, whether by exception or to the merits, made or intended to be made to any such claim, must be presented at one time and filed in the court of original jurisdiction prior to the time fixed for the hearing, and no court shall consider any defense unless so presented and filed. This provision shall be construed to deny to any court the right to extend the time for pleading defenses; and no continuance

shall be granted by any court to any defendant except for legal grounds set forth in the Code of Practice.

"Section 3. That all matters involving any such claim shall be decided within forty-eight hours after submission, whether in term time or in vacation, and whether in the court of first instance or in an appellate court; and all judgments sustaining any such claim shall be rendered and signed on the same day, and shall become final and executory on the fifth calendar day after rendition. No new trial, rehearing or devolutive appeal shall be allowed. Suspensive appeals may be granted, but must be perfected within five calendar days from the rendition of the judgment by the giving of bond, with good and solvent security, in a sum double that of the total amount of the judgment, including costs. Such appeals, whether to a court of Appeal or to the Supreme Court, shall be made returnable in not more than fifteen calendar days from the rendition of the judgment.

"Section 4. That whenever the pleadings filed on behalf of the State, or on behalf of any of its officers charged with the duty of collecting any tax, excise, license, interest, penalty or attorney's fees, shall be accompanied by an affidavit of the officer or of one of his deputies or assistants, or of the counsel or attorney filing the same, that the facts as alleged are true to the best of the affiant's knowledge or belief, all of the facts alleged in said pleadings shall be accepted as prima facie true and as constituting a prima facie case, and the burden of proof to establish anything to the contrary shall rest wholly on the defendant or opposing party.

"Section 5. That this Act shall be construed as providing additional remedies, and only laws or parts of laws inconsistent or in conflict with the provisions hereof are hereby repealed.

"Section 6. That the constitutionality or invalidity of any part of this Act shall not affect the validity or operation of such part or parts thereof as may be constitutional and valid."

The State of Louisiana filed suit against your petitioner on the 31st day of December, 1938, for gasoline taxes, penalties, and attorney's fees basing its procedure on the above quoted Statute of the State of Louisiana, which will hereinafter be referred to as the Procedural Statute. Paragraph one of the State's petition, filed in the 19th Judicial District Court, Parish of East Baton Rouge, State of Louisiana, reads as follows:

> "That this is a summary proceeding brought under the provisions of Act 14 of the Second Extra Session of the Louisiana Legislature for the year 1935, which provides *additional procedure* to facilitate and expedite the determination and trial of all claims by or on behalf of the State for taxes, excises and licenses, and for the penalties, interest and attorney's fees thereon."

On January 10, 1939 petitioner filed six exceptions to the petition of the State of Louisiana, the first of which drew into question the validity of the Procedural Statute as applied and sought to be applied to petitioner on the ground that it is repugnant to the 14th Amendment to the Constitution of the United States in that it denies to your petitioner the equal protection of the law and deprives it of its property without due process of law in the manner and form and for the reasons set out in its exceptions. Petitioner further shows that the first exception filed by it drew into question the validity of the Procedural Statute on the ground that it is repugnant to the Constitution of the United States and to the 14th Amendment to the Constitution of the United States in that the Collector of Revenue of the State of Louisiana, an administrative officer who is charged with the collection of the gasoline tax herein sued upon, has been vested with the arbitrary privilege of choosing the procedure which he will use in each individual case, and has therefore been unlawfully and illegally delegated legislative power, which action on the part of the Legislature of

the State of Louisiana is arbitrary, capricious, unjustly discriminatory and oppressive.

On the same day petitioner filed its answer, reserving all of its rights under the exceptions, as is required by the State practice. Petitioner's answer reads, in part, as follows:

> "Now into Court comes Sinclair Refining Company, with full reservation of all of its rights under the exceptions heretofore pleaded, and without in any manner waiving the same, and only answering at this time because it is required to do so, your respondent for answer to the petition or motion of complainant says:" (R. 42).

The minutes of the 19th Judicial District Court, Division "B", Honorable Charles A. Holcombe, Judge presiding, show that on Tuesday, January 24, 1939, the exceptions filed by petitioner were referred to the merits, and that on Thursday, March 16, 1939, the exceptions were overruled, petitioner reserving its rights thereunder. The minutes show:

> "Six exceptions were filed herein by the defendant. The Court finds that these exceptions are similar to the exceptions filed in the case of State of Louisiana *vs.* Standard Oil Company, 188 La. 978, and therefore overrules the exceptions (R. 2).
>
> "It is distinctly understood that all rights of the defendant under the exceptions are reserved to the defendant" (R. 3).

Petitioner, orally and by brief, argued its exceptions before the court, and on April 24, 1939, Honorable Charles A. Holcombe, presiding judge, rendered judgment overruling the exceptions filed by petitioner and thereby sustaining the validity of the Procedural Statute. That part of his written reasons for judgment pertaining to the exceptions filed by petitioner reads as follows:

"The Exceptions.

"Before answering to the merits defendant filed various exceptions, all of which are substantially the same exceptions that were filed by the defendant in the suits entitled State of Louisiana *vs.* Standard Oil Company of Louisiana, reported in 188 La. 978, 178 So. 601; and 190 La. 228, 182 So. 531, respectively.

"Aside from the exceptions of no cause or right of action and to the jurisdiction of the Court ratione materiae, the exceptions here filed relate to the constitutionality of the statute under which this proceeding is brought.

"As the constitutionality of this statute has been previously sustained by this Court and has been upheld by the Supreme Court, there is no necessity for further discussion of this subject.

"It suffices to say that the Court has considered all of the exceptions filed. In the light of the two decisions of the Supreme Court referred to, I have reached the conclusion that all of the exceptions involving the legality, constitutionality and applicability of the Act under which this suit is brought are without merit and should be overruled" (R. 75 and 76).

Except for a part of the taxes which petitioner admitted to be due, amounting to $128.78 and certain kerosene tax refunds not now in issue, and for certain penalties and attorney's fees arising as the result of the sale of gasoline, from petitioner to Pan American Petroleum Company of Louisiana, the demands of the State were rejected and judgment was rendered in favor of petitioner.

The State of Louisiana thereupon took an appeal to the Supreme Court of Louisiana, which is the highest court before which an appeal may be taken. This appeal was answered by petitioner, who prayed that the judgment of the lower court be affirmed insofar as it denied the right of the State to collect the taxes sued upon, except for that part admitted to be due, and that it be reversed insofar as the

penalties and attorney's fees based on the Pan American transaction were concerned, and, further, that the decision of the lower court overruling petitioner's exceptions, which action maintained the validity of the Procedural Statute, be reversed and that the exceptions be maintained.

After the hearing of oral arguments and the submission of briefs this Honorable Court affirmed the decision of the lower court as to the exceptions and maintained the validity of the Procedural Statute. That part of its written reasons for judgment, which was rendered on the 9th day of January, 1940, pertaining to the exceptions reads as follows:

> "Before answering to the merits, the defendant filed an exception of no cause or right of action, a plea to the jurisdiction of the court ratione materiae, and attacked the constitutionality of Act 14, Second Extra Session of 1935. These exceptions were overruled by the trial judge on the ground, as stated by him in his written opinion, that they 'are substantially the same exceptions that were filed by the defendant in the suits entitled State of Louisiana *vs.* Standard Oil Company of Louisiana, reported in 188 La. 978, 178 So. 601; and 190 La. 338, 182 So. 531, respectively'.
>
> "There was judgment overruling all exceptions and pleas filed by the defendant and upholding the validity of Act 14, Second Extra Session of 1935, and judgment in favor of the State, and against the defendant, as follows:
>
> "(1) For the tax, penalty and attorney's fees at the rate of seven cents (7¢) per gallon on 1,666 gallons of gasoline, plus penalty for delinquency thereon at the rate of 20%, and 10% additional as attorney's fees on both the tax and penalty amounting to the total sum of $153.93, which amount represents gasoline which was sold, used or consumed by the Defendant, and upon which no tax has been paid.
>
> "(2) In the sum of $11,913.95, representing 20% penalty on $59,569.75, the tax which the defendant should have paid the State on 1,191,395 gallons of gaso-

line, sold to the Pan-American Petroleum Corporation at the rate of five cents (5¢) per gallon; in the sum of $2,799.68, representing 20% penalty on the parish tax on 699,922 gallons of gasoline at two cents (2¢) a gallon, and the additional sum of 10% attorney's fees on the above two amounts, all amounting to the sum of $16,184.99.

"(3) In the sum of $611.51, being the tax due on 61,151 gallons of tractor fuel or kerosene at the rate of one cent (1¢) per gallon; in the sum of $122.30, representing the penalty for delinquency thereon at the rate of 20%; and in the sum of $73.38, representing attorney's fees on the aggregate amount of tax and penalty, which tax and penalty amount to the sum of $733.81, or the total sum of $807.19, representing the tax, penalty and attorney's fees on the tractor fuel or kerosene.

"(4) It Is Further Ordered, adjudged and decreed that the State do have and recover legal interest on the above amounts from the date of judicial demand until paid, and that the defendant pay all costs of this suit.

"(5) It Is Further Ordered, adjudged and decreed that in all other respects the demands of the State be, and the same are hereby denied and rejected."

"We shall not discuss the ruling of the trial judge holding that Act 14 of the Second Extra Session of 1935 is constitutional further than to say that his ruling was correct. The attacks made on the validity of that act in this case are the same, or practically the same, as those made in the case of State of Louisiana *vs.* Standard Oil Company of Louisiana, 188 La. 978, 178 So. 601, where it was held that the act is constitutional. We adhere to our holding in that case that the statute is constitutional."

The opinion and decree rendered by this Honorable Court January 9, 1940 further reversed the judgment of the lower court concerning the gasoline taxes, including the penalties and attorney's fees due thereon, holding in favor of the

State and against your petitioner, Sinclair Refining Company. In so doing your Honors construed the taxing statutes in such a way as to infringe the rights and privileges guaranteed to your petitioner by the Constitution of the United States, and so that the validity of the taxing statutes, as now construed by your Honors and as now applied to your petitioner was drawn in question.

This Honorable Court reversed that part of the trial court's judgment awarding the sum of $16,184.99 against petitioner on account of penalties and attorney's fees upon a quantity of gasoline sold by petitioner to Pan American Petroleum Corporation and acquitted petitioner of liability therefor and the claim based thereon is not here in question.

The statutes on which the State bases its claim for gasoline taxes, including penalties and attorney's fees thereon, were set out in paragraph IV of its petition:

"IV.

"That the Sinclair Refining Company, defendant herein, is and has been during the entire period covered by this suit a "dealer", as defined by the statute, in gasoline and motor fuel, kerosene and petroleum products in the State of Louisiana. That the taxes claimed in this suit are imposed by the following Acts of the Louisiana Legislature, to-wit:

"Act No. 6 of the Extra Session of 1928 as amended by Act No. 8 of 1930, as amended by Act No. 16 of 1932, as amended by Act No. 34 of 1934, which Act imposes the 4¢ per gallon State Tax.

"Act No. 1 (E. S.) of 1930, which Act was a constitutional amendment and imposes the 1¢ per gallon State tax.

"Act No. 87 of the Regular Session of 1936, which became effective July 28, 1936, and imposes the 2¢ per gallon Parish tax to provide revenue for the Parishes and the City of New Orleans for their economic security and social welfare.

"Act No. 15 of (E. S.) of 1934, which imposes a tax of 1¢ per gallon on kerosene to provide revenue for the State Board of Health for use in stamping out tuberculosis.

"Act No. 14 of 1932, as amended by Act 12 of 1934, imposing an inspection fee of 1/32 of 1¢ per gallon on all gasoline, kerosene or motor fuel distributed, sold or offered or exposed for sale, and known as the Inspection Fee Law" (R. 8 and 9).

For the sake of convenience we shall refer to the above statutes as the taxing statutes, copies of which are attached hereto for reference.

The essence and purpose of these Acts is to lay a tax on motor fuels, which, petitioner contends, is an excise or sales tax and is to be based on the amount of motor fuel, gasoline etc. actually sold, used or consumed within the State of Louisiana as will be seen from the title of Act 6 of 1928, which reads substantially the same as do the other acts:

"To provide revenues for the public highways of the State of Louisiana by levying a tax of four cents per gallon on all gasoline or motor fuel sold, used or consumed in the State of Louisiana for domestic consumption, as authorized by paragraph A, Section 22, Article VI, of the Constitution of Louisiana of 1921, as amended, defining "motor fuel" and "dealers", making the furnishing of bond to guarantee the tax and penalties compulsory, fixing the time of collecting such tax and providing for the expense thereof, prescribing the manner and methods of enforcing payment, and fixing penalties for failure to make same, requiring all those engaged in the handling, selling, or distribution of gasoline or motor fuel to make such reports of their business as may be necessary for the proper enforcement of this Act, providing that all said taxes collected under the provisions of this Act shall be credited to the General Highway Fund and expended for the

purpose of the construction and maintenance of the system of State Highways and bridges, and for such other purposes as provided for in paragraph (a), Section 22, of Article VI, of the said Constitution of Louisiana, and repealing all laws or parts of laws in conflict therewith. (As amended by Act 34 of 1934.)"

The State brought its action for taxes basing it on the proposition that the gasoline in question had been sold, used or consumed in the State of Louisiana, and in the alternative and in the event that the gasoline had not been sold, used or consumed, that petitioner failed to make satisfactory proof thereof. Paragraphs V, XII and XIII of the State's petition:

"V.

"That during the period January 1, 1935 to June 1, 1938, the Sinclair Refining Company, defendant herein, imported into the State of Louisiana for distribution, sale or use in the State of Louisiana, 52,444,125.35 gallons of gasoline or motor fuel, all of which was subject to tax under the said Acts. That the Sinclair Refining Company, defendant herein, reported and paid the tax on 50,852,263.05 gallons of gasoline or motor fuel, *after* having deducted the 3% allowance for *'loss in handling'* provided for by the statute. That the Sinclair Refining Company, defendant herein, imported, handled, distributed, sold, used or consumed 1,591,862.30 gallons of gasoline or motor fuel and failed to pay any tax thereon. That after deducting 3% as provided by the statute to cover 'loss in handling', the defendant should have paid and failed to pay the State tax of 5¢ per gallon on 1,544,105.95 gallons, or the sum of $77,205.27. The Sinclair Refining Company, defendant herein, should have also paid the Parish tax of 2¢ per gallon on 699,922.80 gallons, or the sum of $13,998.46. The Sinclair Refining Company, the defendant herein, should have likewise paid the inspection fee of 1/32 of 1¢ per gallon on all of the gasoline which was sold, offered for sale, or exposed for sale, amounting to

$497.45, or a total of $91,701.18, together with 20% penalty for delinquency thereon, amounting to $18,240.75, or a grand total of $109,941.93, together with 10% as attorney's fees on the said aggregate amount, all as shown upon Schedule "A" of the statement hereto attached and made a part hereof" (R. 9).

"XII.

"Your mover shows that the aforesaid gasoline and kerosene were imported into the State from outside the State for distribution, sale, use or consumption in the State, and the tax imposed by the pertinent statutes levied upon said commodities; and that all of said gasoline and kerosene were presumed to be imported into the State and held in the State for sale, distribution, use or consumption within the State, and, in fact, the same were sold, handled, distributed used or consumed within the State. * * *" (R. 13, 14).

"XIII.

"Your mover, with respect, represents in the alternative, and only in the alternative, in the event it should be contended that any part of the gasoline or kerosene, which forms the basis of this suit, was not sold, used or consumed, then and only then, and in the alternative, your mover shows that *after* having deducted the 3% provided in the pertinent statutes to take care of 'loss in handling,' no taxpayer, including the defendant, has the authority to make any further deduction in remitting his taxes to the State, as was done in the instant case. That all gasoline or motor fuel imported into this State, or held in this State by any dealer, is presumed to be sold, distributed, handled, used or consumed within this State, and is subject to the tax levied by the Statutes, and the Sinclair Refining Company, defendant herein, has failed to furnish satisfactory proof to the contrary to your mover, who is charged with the duty of collecting all such taxes. That hence, if it should be contended that any part of said gasoline, which forms the basis of this

suit, or any part of the kerosene, which forms the basis of this suit, was not sold, distributed, used, handled or consumed within this State then your mover, in the alternative, represents that the Sinclair Refining Company, defendant herein, has failed and neglected to show by satisfactory proof, or any proof, to the contrary, and it has arbitrarily and without authority assumed the right to deduct a tax which has levied on the commodity and for which it has failed to account to the State" (R. 14 and 15).

Due proof was offered before the lower court and the State's demand for these gasoline taxes, with the exception of small amount, $128.78, admitted to be due, was rejected, and the State took an appeal to this Honorable Court. A small judgment was also rendered for kerosene taxes, which is not here involved.

The main issue, aside from the validity of the Procedural Statute, noted above, and the Pan American transaction, which is no longer before the court, was the question of whether the tax was due under the gasoline taxing statutes. Both by briefs and by oral argument the State of Louisiana contended before this Honorable Court that losses to the extent of 1,591,862.50 gallons of gasoline (or a net of 1,544,-105.95 gallons of gasoline after deducting a 3% allowance) due to evaporation, leakage, spillage, etc., in the total quantity of all gasoline imported into the State of Louisiana for all purposes (including the losses in the quantity imported for interstate and foreign commerce and for sale and distribution to the United States Government) during the taxable period were subject to be taxed in addition to the tax upon the quantity (less the 3% allowance) actually sold, used or consumed within the State. The State contended that the 3% allowance on the quantity actually sold, used or consumed in the State was intended to compensate petitioner for the entire loss for handling all the imports. At

page 16 of the supplemental brief on behalf of the State, which in truth and in fact was the State's main brief, the State says:

"SHORT QUESTION.

"The short question the court is called upon to answer is this:

"Does the Gasoline Tax Law (Act 6 E. S. 1928, as amended, and Act 1 Extra Session 1930) authorize the dealer to deduct for *stock losses* or *evaporation* in *addition* to the 3% allowance provided by the statute to cover *'losses in handling?'* What losses does the phrase *'losses in handling?'* include and cover?" Page 16 of State's brief.

Petitioner contended that the tax only was due on that amount of gasoline sold, used or consumed in the State of Louisiana, less the 3% deduction allowed by the statute. It was on this issue that the case was argued before this Honorable Court.

When this Honorable Court said, therefore, that

"we now hold that 'dealers' (as defined in the acts) in gasoline or other motor vehicle fuel must pay the tax on the total gallonage manufactured or imported into this state for sale, use or consumption therein, less the 3 per cent which the statutes allow dealers to deduct to cover their losses in handling such motor vehicle fuel. In other words, the dealers must pay the tax on 97 per cent of the total gallonage manufactured or imported into the state for sale, use or consumption in the state, and not on the gallonage actually sold, used or consumed."

The actual effect of this Court's decision as applied to petitioner in this case was to tax not only 97% of the total gallonage manufactured or imported into the State for sale, use or consumption in the State as announced by this Court, *but in addition thereto taxed the gallons lost within the*

State out of the large quantity of gasoline imported into the State for interstate and foreign commerce and for sale and delivery to the United States Government.

Your Honors placed an entirely new and different construction on the taxing statutes. This construction changed the taxing statutes from an excise or sales tax to a tax on imports; it entirely overthrew the departmental and administrative construction placed on the taxing statutes for eleven years, and which remained unchanged through seventeen sessions (including extra sessions) of the Legislature of Louisiana; it failed to follow the construction given the Statutes in the *Standard Oil* Case, 190 La. 338, 182 So. 531; it completely disregarded the construction placed on these statutes by the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, in the consolidated cases of *Shell Petroleum Corporation, the Texas Company; and the Magnolia Petroleum Company* v. *Hugh M. Wilkinson et al.*, 21 Fed. Supp. 771.

This new and unforeseen construction of this Honorable Court as applied to petitioner denies to it the equal protection of the laws and deprives it of its property without due process of law in violation of the 14th Amendment to the Constitution of the United States, and violates Article I, section 8, clause 3, of the Constitution of the United States, whereby Congress alone has the power to "regulate commerce with foreign nations and among the several states, and with Indian tribes."

The decision of this Honorable Court, changing the construction and application of the taxing statutes as aforesaid, drew in question the validity of such taxing statutes under the Constitution of the United States as aforesaid and likewise drew in question the rights and privileges guaranteed to petitioner by the Constitution of the United States, and which decision could not prior thereto have been

reasonably foreseen and anticipated by petitioner. The taxing statutes as construed and applied by the trial court did not draw into question the validity of such statutes and the rights and privileges guaranteed to petitioner by the Constitution of the United States were not infringed by the decision of the trial court and the trial court's construction and application of the taxing statutes.

Further than this, the case at bar might have been decided on a non-Federal question. In the case of *International Steel and Iron Co.* v. *National Surety Co.*, 297 U. S. 657, 56 S. C. 619, the Supreme Court of the United States decided that where a case might have been decided on the basis of a non-Federal question, but was not, that the case was then properly within its jurisdiction:

> "The respondent insists that as the appellant joined the Equitable Company, surety on the refunding bond, as a defendant, it sought to take advantage of the amendatory act of 1929 and is now estopped to question the constitutional validity of the statute. Appellant replies that the suit went upon the theory adopted by the chancellor that the amendatory act was not retroactive so as to release the earlier bond but intended merely to substitute a refund-bond in the place of the funds retained by the Highway Commissioner which, under the original act, were also held for satisfaction of the appellant's claim. Such a construction of an act which had not been passed upon by any court was permissible, and if, as now appears, the appellant was in error in so construing the act, the mistake cannot be made the basis of an estoppel. In both appellate courts the appellant insisted on its original view that the act of 1929 did not operate to discharge the obligation of the appellee's bond. The appellee asserted no estoppel in either of those tribunals. Not until the decision of the Supreme Court was there a holding that the act retroactively affected the enforceability of the bond. Not until then was there occasion

for appellant to urge that, if so construed, the act would impair the obligation of the bond. As we have indicated, the record discloses that when this construction of the act appeared probable, the appellant promptly raised the constitutional question. It cannot be estopped so to do by its previous insistence upon a construction which would render the statute consistent with the act of 1917 and present no constitutional difficulty. The appellee says that estoppel, a non-federal ground, adequate to support the judgment, was in the case from its inception. The point was not made or considered in the state courts. The validity of the act was adjudged on the issue of impairment of the obligation of the appellee's bond. We do not, therefore, consider the defense of estoppel.

"The rule that when the decision of a state court may rest upon a nonfederal ground adequate to support it, this Court will not take jurisdiction to determine the federal question, has no application where, as here, the nonfederal ground might have been considered by the state court but was not."

This is the same view that was taken in *Grayson* v. *Harris*, 267 U. S. 352, 45 S. C. 317, wherein, at p. 319, the Supreme Court held:

"Nor need we inquire into the defense of the statute of limitations. The decision now under review entirely ignores it. The rule that when the decision of a state court may rest upon a nonfederal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the nonfederal ground might have been considered by the state court but was not. Rogers *v.* Hennepin County, 240 U. S. 184, 188, 189, 36 S. Ct. 217, 60 L. Ed. 469; Henderson Bridge Co. *v.* Henderson City, 173 U. S. 592, 608, 19 S. Ct. 533, 43 L. Ed. 823."

It has further been held by the Supreme Court of the United States that even though the federal question in-

volved might have been raised in the trial court, or in an intermediate court, but was not raised there because the rights of the parties, under the courts' decisions, were not infringed because of a holding in favor of the party raising the question, that the raising of the federal question for the first time in a petition for reargument does not come too late. *Grannis* v. *Ordean*, 234 U. S. 335, 34 S. C. 779 at 782:

> "There is a motion to dismiss, upon the ground that the Federal question was not properly raised in the state court. This motion must be denied. It is true that until the decision of the Supreme Court of the State, the Federal right was not clearly asserted. But it was not infringed in the trial court, which held in favor of the contention of defendant (now plaintiff in error) that the decree in partition suit was not valid because of the insufficiency of the notice to Geilfuss. It was the decision of the Supreme Court, upholding the notice, that first ran counter to the alleged Federal right. In a petition for reargument, filed by the now plaintiff in error, it was suggested that the necessary effect of the decision was to deprive him of his property without due process of law, contrary to the 14th Amendment. The Supreme Court entertained the petition, considered and overruled the contention that petitioner's rights under the Amendment were infringed, declared that its decision was to be interpreted as holding against the contention, and therefore refused a reargument. This is sufficient to confer jurisdiction upon this Court. Mallett *vs.* North Carolina, 181 U. S. 589, 592, 45 L. Ed. 1015, 1017, 21 Sup. Ct. Rep. 730, 15 Am. Crim. Rep. 241; Leign *vs.* Green, 193 U. S. 79, 85, 48 L. Ed. 623, 626, 24 Sup. Ct. Rep. 390; McKay *vs.* Kalyton, 204 U. S. 458, 463; 51 L. Ed. 566, 569, 27 Sup. Ct. Rep. 346; Sullivan *vs.* Texas, 207 U. S. 416, 422, 52 L. Ed. 274, 277, 28 Sup. Ct. Rep. 215; Kentucky Union Co. *vs.* Kentucky, 219 U. S. 140, 158, 55 L. Ed. 137, 156, 31 Sup. Ct. Rep. 171."

In the case at bar the rights of petitioner were not infringed, in respect to the Constitutional questions now under discussion, until the opinion and decree of this Honorable Court was rendered. Until that time the demands of the State for the taxes allegedly due under the taxing statutes had been denied.

Subsequent to the decision of this Honorable Court petitioner seasonably filed an application for a rehearing before this Court. In its application petitioner renewed, as reasons why a rehearing should be granted, its arguments on the exceptions filed by it, and, in addition thereto, stated that a rehearing should be granted on the grounds that the opinion and decree of this Honorable Court, as applied to petitioner, violated the due process clause of the 14th Amendment to the Constitution of the United States, violated the equal protection clause of the 14th Amendment to the Constitution of the United States; and violated the commerce clause of the Constitution of the United States, which is Article I, section 8, clause 3.

Your petitioner further contended in its application for a rehearing that the validity of the taxing statutes as construed by this Honorable Court and applied to your petitioner was drawn in question on the grounds as set forth in the preceding paragraph.

The petition for rehearing was denied by Your Honors on May 8th, 1940, without the assignment of written reasons therefor.

A situation very similar to the case at bar was presented to the Supreme Court of the United States in *State of Missouri, ex rel. Missouri Insurance Co.* v. *Gehner*, 281 U. S. 313, 50 S. C. 326. In that case the question of whether certain United States bonds were subject to taxation, was raised. The first decision holding that such bonds were subject to taxation was in the highest court of the State of Missouri. Plaintiff therein then filed a petition for a

rehearing on the ground that such a construction of the statute infringed its Constitutional rights. The Supreme Court said:

> "It is well settled that this Court will not consider questions that were not properly presented for decision in the highest court of the state. Ordinarily, it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more. Citizens' National Bank *v.* Durr, 257 U. S. 99, 106, 42 S. Ct. 15, 66 L. Ed. 149. But here the company, at the first opportunity, invoked the protection of the Federal Constitution and statute. It could not earlier have assailed the section as violative of the Constitution and laws of the United States. The board of equalization completely eliminated the bonds from its calculations, and there is nothing in the language of the section to suggest that it authorizes any diminution of the amount of the deductible reserve and unpaid claims or an apportionment of such liabilities between taxable and nontaxable assets. It may not reasonably be held that the company was bound to anticipate such a construction or in advance to invoke federal protection against the taxation of its United States bonds. Upon the facts disclosed by this record it is clear that appellant sufficiently raised in the highest court of the state the federal questions here presented, and is entitled to have them considered. Saunders *v.* Shaw, 244 U. S. 317, 320 37 S. Ct. 638, 61 L. Ed. 1163; Ohio ex rel. Bryant *v.* Akron Park District, 281 U. S. 74, 50 S. Ct. 228, 74 L. Ed. —— ."

Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673, 50 S. C. 451, involved a federal question which was raised first on application for rehearing. In that case, which came up on a writ of certiorari to the Supreme Court of the State of Missouri, the Supreme Court of Missouri, which is the highest state court in Missouri, overruled a former decision rendered by it. The plaintiff filed a peti-

tion for a rehearing within the time allowed by law, and at that time raised the federal question involved. The Court held that it had jurisdiction:

> "The plaintiff seasonably filed a petition for a rehearing in which it recited the above facts and asserted, in addition to its claims on the merits, that in applying the new construction of article 4 of chapter 119 to the case at bar, and in refusing relief because of the newly found powers of the commission, the court transgressed the due process clause of the Fourteenth Amendment. The additional federal claim thus made was timely, since it was raised at the first opportunity. Missouri ex rel. Missouri Ins. Co. *v.* Gehner, 281 U. S. 313, 50 S. Ct. 326, 74 L. Ed. ——."

In the case at bar this Honorable Court has overturned the administrative construction of the statutes in question, which construction had been followed and acted upon for 11 years, has in effect overruled the decision rendered in the case of *Standard Oil Company, supra,* and has failed to recognize the decision rendered by the Federal court in the *Magnolia, Texas and Shell* cases, *supra.*

Petitioner could in no way foresee the actions of this Honorable Court and was not bound to anticipate that the taxing statutes would be construed to levy a tax based upon importation and particularly upon losses in importation in interstate commerce and losses in importation for sales and deliveries to the United States Government; nor could petitioner anticipate and foresee that no provision would be made whereby petitioner could continue to make sales and deliveries to the United States Government without having to lose the full amount of 7¢ per gallon; nor could petitioner anticipate and foresee that it would be discriminated against and denied the equal protection of the law; and even if such questions could have been foreseen petitioner was not bound to raise them until such time as they

became an issue in this case, that is, until the decision of this Honorable Court was rendered.

It is of the utmost importance that the questions involved in this case be reviewed by the Supreme Court of the United States as they are of substantial importance to the State of Louisiana, to the oil industry in general and to your petitioner who has been cast to pay a judgment of $120,438.59 and who will be required to pay large sums in the future thereunder. A decision of the Supreme Court of the United States will put at rest the question as to the limits to which a State may go in levying taxes on goods imported into the State for sale, use or consumption; it will put at rest the question of whether a State may tax the right to import as distinguished from the right to levy an excise tax upon the sale, use or consumption of imported goods within the State; it will put at rest the right of a State to tax losses occurring within the State in imports in interstate and foreign commerce not intended for sale, use or consumption within the State; it will put at rest the question of whether one of a class may be taxed upon a different basis from others in the same category similarly situated; it will put at rest the question of whether a citizen may be required to pay a tax on sales to the United States Government or loss in quantities imported for such sales and deliveries; and will serve as a guide to determine the limits within which a statute providing for summary procedure may be invoked without the deprivation of property without due process of law and without denial of equal protection of the law.

A copy of the decision of the trial court rendered April 24, 1939, and a copy of the decision of the Supreme Court of Louisiana rendered January 9, 1940, are attached hereto.

Petitioner duly presented to this Honorable Court on the 12th day of July, 1940, its petition on appeal from the Supreme Court of the State of Louisiana to the Supreme Court of the United States or for the issuance of a writ of

certiorari from the Supreme Court of the United States to the Supreme Court of the State of Louisiana, together with accompanying assignments of error, which petition and assignments of error were seasonably filed with the Clerk of the Supreme Court of Louisiana on the 12th day of July, 1940.

Respectfully submitted,

(Signed) ROY T. OSBORN,
Of New York, N. Y.;

(Signed) V. R. TOMLINSON,
Of Ft. Worth, Texas;

(Signed) ALFRED MCKNIGHT,
Of Ft. Worth, Texas;

(Signed) WILLIAM A. PORTEOUS, JR.,

(Signed) F. CARTER JOHNSON, JR.

EXHIBIT "A".

REASONS FOR JUDGMENT.

Dated April 24, 1939. Filed April 24, 1939.

No. 13,757.

STATE OF LOUISIANA,

vs.

SINCLAIR REFINING COMPANY.

19TH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA.

This is a summary proceeding by the State under the provisions of Act 14 of the Second extra session of the Legislature for the year 1935 against the Sinclair Refining Company, domiciled at Portland, Maine, but engaged in the business of "dealer", as defined by law in gasoline or motor fuel, kerosene and petroleum products in the State of Louisiana.

The plaintiff asserts a total claim of $135,758.36 against the defendant, with legal interest thereon from judicial demand until paid, plus 10% on the principal and interest as attorney's fees.

The suit is based upon an audit alleged to have been made by the Department of Revenue which it is claimed, covers the period beginning January 1, 1935, and ending June 1, 1938.

It involves State and Parish taxes on gasoline and the inspection fee thereon; a penalty for delinquency on certain gasoline alleged to have been sold by defendant to the Pan-American Petroleum Corporation without first paying the tax thereon and the tax on kerosene or tractor fuel refunds that were disallowed for the period June 1, 1936 to June 1, 1937.

Stated otherwise, the plaintiff's petition contains a demand for: (1) The State tax at the rate of 5¢ per gallon on net taxable gallons of gasoline amounting to 1,544,105.95,

amounting to $77,205.27; (2) the Parish tax on 669,922.80 gallons of gasoline from August 1, 1936, to June 1, 1938, amounting to $13,998.46, and inspection fee of $497.45; (3) a 20% penalty for delinquency on the aggregate amount of State and Parish taxes due; and (4) attorney's fees of 10% on the total amount of $109,941.93, which last amount represents the total amount of State and Parish taxes due, inspection fee and penalty for delinquency.

In addition to this amount the plaintiff demands (1) the sum of $24,580.00, representing the penalty for delinquency at the rate of 20% on $102,802.75, the amount of the tax on 2,056,054.68 gallons of gasoline sold to the Pan-American Corporation, which it says was not timely paid, with 10% thereon as attorney's fees; and, (2) the sum of $1,235.75, with 10% attorney's fees thereon, representing tractor fuel refunds that were disallowed for the period June 1, 1936 to June 1, 1937, the total number of gallons of tractor fuel involved being 102,979 gallons.

The Exceptions

Before answering to the merits defendant filed various exceptions, all of which are substantially the same exceptions that were filed by the defendant in the suits entitled State of Louisiana *v.* Standard Oil Company of Louisiana, reported in 188 La. 978, 178 So. 601; and 190 La. 228, 182 So. 531, respectively.

Aside from the exceptions of no cause or right of action and to the jurisdiction of the Court ratione materiae, the exceptions here filed relate to the constitutionality of the statute under which this proceeding is brought.

As the constitutionality of this statute has been previously sustained by this Court and has been upheld by the Supreme Court, there is no necessity for further discussion of this subject.

It suffices to say that the Court has considered all of the exceptions filed. In the light of the two decisions of the

Supreme Court referred to, I have reached the conclusion that all of the exceptions involving the legality, constitutionality and applicability of the Act under which this suit is brought are without merit and should be overruled.

I am also of the opinion that the exceptions of no cause of action and of no right of action, as well as the exception to the jurisdiction of the Court should also be overruled.

The defendant in its answer says that during the period beginning January 1, 1935, and ending June 1, 1938, it imported 177,451,523 gallons of gasoline through its terminal at Westwego, Louisiana, and exported in interstate and foreign commerce 133,485,334 gallons of gasoline; that it shipped from its Westwego terminal to customers and to its bulk oil storage and marketing stations located in Louisiana 41,663,590 gallons of gasoline, and that in addition it purchased from other bonded "dealers" transacting business in the State an additional quantity of about 10 million gallons of gasoline; *that of the quantity shipped to its bulk oil storage and marketing stations and purchased from other State "dealers", respondents sold, used and consumed only the quantity of 51,479,763.5 gallons upon which all taxes and inspection fees were paid;* that during said period respondents suffered *sundry losses of gasoline in handling,* storage and shipment thereof at its Westwego terminal in the amount of 1,646,551.3 gallons, said losses having occurred in such manner and under such circumstances *that said quantity could never be sold, used or consumed within the State or elsewhere.*

Respondent, therefore, claims that it does not owe a tax on gasoline which it has not sold, used or consumed. Respondent avers in that it is a "bonded dealer" in gasoline under the statute, and claims that it is and was relieved of the obligation to pay taxes upon gasoline or motor fuel *immediately upon the manufacture, importation or com-*

pounding of said product within this State. It further avers that plaintiff's construction of the law that the tax is due immediately upon the manufacture, importation or compounding of gasoline in this State is incorrect *insofar as it applies to "bonded dealers" who have posted a bond to insure the payment of the tax only upon gasoline actually sold, used or consumed within the State.*

Respondent admits that there is a statutory presumption that all gasoline or motor fuel imported into the State or held in the State by any "dealer" is for use or consumption within the State, but it says that this presumption may be rebutted by proof to the contrary. It says:

> "It is now and at all times in the past has been ready to establish satisfactory proof that the gasoline upon which the tax, penalty and attorney's fees is sought to be collected in this case has not been sold, used or consumed within the State of Louisiana."

Respondent's position as to the sale of gasoline by it to the Pan-American Petroleum Corporation appears in paragraph 6 of its answer and substantially is that while it did deliver to this corporation during the year 1936, 2,119,644 gallons of gasoline and did not at the time pay the tax thereon to the State or collect it from the purchaser, the State lost nothing on the transaction for the reason that the Pan-American Petroleum Corporation, the purchaser, assumed the obligation to pay the tax, and thereafter, did actually pay the same including the inspection fee; that prior to the filing of this suit no demand was ever made upon it for the correction of the returns it made for the period during which the said gasoline was sold and delivered to the Pan-American Petroleum Corporation. Under these circumstances respondent claims that *there is no delinquency whatsoever but in the alternative it says that as the*

tax was actually paid by its purchaser no penalty or attorney's fees should be assessed against them.

For answer to the allegation of plaintiff's petition to the effect that during the period June 1, 1936, to June 1,1937, the Sinclair Refining Company unlawfully deducted the tax at the rate of 1¢ per gallon on 102,979 gallons of kerosene, alleged to have been used as tractor fuel, respondent denies that said deductions were illegal or unauthorized. On the contrary, it avers that the required affidavits, duly signed by the consignees, were timely furnished the Department of Revenue, and that the law was fully complied with, but it says, if said deductions were not legally made, the State's claim is not against defendant but against the consignees and users of said tractor fuel.

In the brief filed on behalf of the State, it is stated that proper affidavits were filed within ninety days covering 37,108 gallons of tractor fuel, upon which the State makes no claim. Of the remainder, however, the State contends that the affidavits submitted to show no tax was due on 4,720 gallons thereof *were executed prior to the date of the sale of said tractor fuel,* while the affidavits pertaining to the balance, that is 61,151 gallons *were not executed within ninety days of the sale,* hence the law was not complied with either as to the 4,720 gallons or the 61,151 gallons of tractor fuel and that therefore the tax, penalty, and attorney's fees are due thereon.

On the Merits

Learned counsel for the defendant admit in their brief that the defendant owes the State the tax, penalty and attorney's fees on 1,666 gallons of gasoline, amounting to $128.78, and they also admit that defendant owes the State kerosene tax amounting to $611.51, plus 20% penalty thereon, amounting to $122.50 and 10% additional on this sum

as attorney's fees, or a total of $807.19. This last amount, added to the gasoline tax admittedly due, makes a total of $935.97, which the defendant through its counsel, admits it owes the State of Louisiana, but it denies owing any sum in excess of that amount.

I have concluded before attempting an analysis of the facts and figures in this case to briefly state the respective positions taken by counsel for plaintiff and relator as to the law. Before doing so and before expressing any conclusion relating to the law, I cannot refrain from saying that it is indeed regrettable that the gasoline tax statute is so worded that the question presented in this case is so difficult of solution.

It is to be hoped that at the final termination of this case the tax collecting authorities, as well as the gasoline tax payers will be enabled to know beyond any doubt whether or not the "dealer" in gasoline must pay the tax, (less the 3% deduction allowed under the statute) upon gasoline *imported in this State FOR SALE, USE OR CONSUMPTION IN THE STATE* or upon gasoline *actually sold, used or consumed in the State.*

Frankly, I must confess that in my opinion the question presented is far from settled either way.

The plaintiff's contention is that the tax is due and payable by the "dealer" on every gallon of gasoline he brings into the State for sale, use or consumption in the State less 3%, *regardless of how much is lost by evaporation, shrinkage or leakage,* whereas the defendant claims *that the tax is due only upon that quantity of gasoline imported* into the State *that is actually sold, used or consumed, less the arbitrary deduction of 3%.*

Defendant's position is that if a "dealer" imports into the State for sale, use or consumption 10,000 gallons of gasoline and after its delivery here 1,000 gallons thereof are lost by leakage, shrinkage or evaporation the tax is due on

the gallonage actually left and actually sold, that is on 9,000 gallons, less 3%. On the other hand, the State contends that the 3% deduction was intended to cover losses of all kinds, except from providential causes, and that nothing is to be allowed, in addition to this 3% for evaporation, leakage, shrinkage, or other losses in handling.

Opinion

The only case to which the Court has been referred that holds or seems to hold that a bonded "dealer" in gasoline in this State, *under all circumstances*, must pay the tax on the entire quantity of gasoline imported for sale, use or consumption in Louisiana, is the case of *State* v. *Mahr*, 151 So. 907-910, decided by the Court of Appeal, 2nd Circuit.

This decision holds that the tax was due by defendant for the entire amount of gasoline imported, but that the "dealer", having furnished a bond, is privileged to pay the taxes *on his sales at the time prescribed by law.* Frankly I cannot understand, if he is only to pay on his sales at certain times, *when the time arrives that he must pay the tax on the difference between the quantity of gasoline he "imports" and the quantity he sells, uses or consumes.*

I have reached the conclusion that he does not have to pay it at all, if after the original importation, *this difference is lost by evaporation or leakage, or other cause.*

My conclusion is based upon the fact that the gasoline tax is an excise tax. I cannot conceive how one can be required to pay a tax for the privilege of selling something that does not exist.

It is my view that although under the statute, all gasoline imported into the State is presumed to be imported for sale, use or consumption, *this presumption can be overcome by proof that before the time came for the sale thereof, a certain quantity of the amount imported, by reason of leak-*

age, shrinkage or evaporation, was lost, and therefore, could not be sold, used or consumed.

I am further of the opinion that under the constitution, the legislature's authority is limited to levying a tax only on gasoline, sold, used or consumed in the State.

The authority for imposing gasoline taxes in Louisiana is found in Section 22 of Article VI of the Constitution of 1921, which authorizes the collection of a tax of two cents per gallon on gasoline sold in the State.

At the session of the Legislature in 1928 there were adopted for submission to the people two amendments to this Article of the Constitution. Act 204 of 1928 proposed an amendment to said article by adding thereto Section 25, which reads as follows:

> "The provisions hereinabove relating to the tax on gasoline, shall apply to all gasoline *sold, used or consumed in the State of Louisiana;*

While Act 219 of 1928 proposed an amendment to said article to this effect:

> "On gasoline, benzine, naptha and other motor fuel, as defined by law, *when sold, used or consumed* in the State of Louisiana, there shall be levied a tax not to exceed four (4¢) cents per gallon, to be collected as prescribed by law."
>
> These amendments were duly adopted.

Act No. 6 of the Extra Session of 1928, as amended has this title:

> "To provide revenues for the public highways of the State of Louisiana by levying a tax of four cents per gallon on all gasoline or motor fuel *sold, used or consumed in the State of Louisiana for domestic consumption,* as authorized by paragraph A, Section 22, Article VI, of the Constitution of Louisiana, of 1921, as amended, defining motor fuel, fixing the time of collecting such tax and providing for the expense thereof,

prescribing the manner and method of enforcing payment, and fixing penalties for failure to make same, requiring all those engaged in the handling, selling or distribution of gasoline or motor fuel to make such reports of their business as may be necessary for the proper enforcement of this Act, providing that all said taxes collected under the provisions of this Act shall be credited to the General Highway Fund and expended for the purpose of the construction and maintenance of the system of State Highways and bridges, and for such other purposes as provided for in paragraph (a), Section 22 of Article VI, of the said Constitution of Louisiana, and repealing all laws or parts of laws in conflict therewith."

Section 1 thereof reads in part as follows:

> "Section 1. Be it enacted by the Legislature of Louisiana, That there is hereby levied a tax of four cents (4¢) per gallon on all gasoline, or motor fuel, *sold, used or consumed in the State of Louisiana for domestic consumption,* to be collected as hereinafter set forth."

It, therefore, seems to me that from the very wording of the act it was never the intention of the Legislature to levy a tax except on gasoline, "*sold, used or consumed.*"

In my opinion if a dealer *imports* 10,000 gallons of gasoline into this State, admittedly, *intended* for sale, and he does not sell but 9,000 gallons thereof, the other being lost by spillage, evaporation or leakage before he can sell it, he cannot be required to pay a tax on gasoline thus lost and which he did not and could not sell.

In the case of State of *Louisiana* v. *Strother,* upon which the State so strongly relies, the Supreme Court, in my view, in effect, held that the reason and the only reason that Strother's claim for a deduction on account of "leakage, spillage or other causes," was denied was because Strother *failed to prove the leakage, spillage or other causes of loss.*

If he had made satisfactory proof thereof, the inference from that decision is that he would have been entitled to deduct the quantity of gasoline so lost, and to have paid a tax only on such gasoline that he actually sold, used or consumed, less 3%. Let us quote from that decision:

"It is not disputed that the defendant Strother imported into the State 353,268 gallons of gasoline which were subject to taxation. Hence the state has clearly presented a prima facie case against defendant for the taxes due on the gasoline, *unless defendant has rebutted the presumption of liability by satisfactory proof furnished the supervisor of public accounts. But defendant has failed to furnish such proof, and he has also failed to establish on the trial of this case his nonliability* for the taxes herein demanded.

"In his report for the month of July, 1931, defendant arbitrarily deducted from the importations for that month 2,993 gallons of gasoline on 'account leak in gas pipe connections.' In his report for August, 1931, defendant in addition to the statutory allowance of 3 per cent, claimed a deduction of 1,265 gallons 'for leakage and shrinkage.' And in his report for October, 1931, defendant, in addition to the 3 per cent statutory allowance, claimed a deduction of 1,192 gallons on account of 'error in tank wagon gauge.' Notwithstanding all these claims for deductions were promptly rejected by the Supervisor of Public Accounts, defendant made no attempt to establish their correctness.

"It appears from the record the defendant Strother, in his monthly reports to the Supervisor of Public Accounts, made further deductions for gasoline claimed to be lost in various ways, but he made no claim for the deductions, because he considered it was no use to do so.

"But, on the trial of this case, defendant made no attempt whatever to prove his losses in gasoline from leakage, spillage, or other causes. Nor did he attempt to show how much of the imported gasoline he had in his possession, thus indicating he had sold or disposed of the entire amount of gasoline imported by him be-

tween May 5, 1931, and December 31, 1931. And defendant expressly admitted he had made only a partial payment for November, 1931, and no payment at all for December, 1931, on account of the taxes due by him for those months.' "

I am not unmindful of the wording of the allowance provision of the Act, as follows:

> "Provided that an allowance of three per cent of the total gallonage received during every calendar month shall be made and deducted by the dealer to cover his or their losses in handling such motor vehicle fuel and that a refund shall be made to said dealer for the tax paid on all motor vehicle fuel which after such payment shall be lost or destroyed by fire, lightning, flood, tornado, windstorm, explosion or other accidental or providential cause."

It is very true that this proviso uses the words "their losses in handling" in referring to the 3% allowance, yet, in view of all of the decisions of the appellate courts with respect to this allowance clause, I am of the opinion that these words are not to be literally construed. On the contrary, I am of the opinion that the 3% referred to is an arbitrary deduction only and has no relation to losses actually sustained in handling. In other words, that the legislature adopted a purely arbitrary method of taxation, that is, by levying the tax upon 97% of the amount of gasoline sold, used or consumed instead of upon all of the gasoline sold, used or consumed. If in doing this, the legislature, in effect, made a "donation" to the gasoline "dealers", it is the duty of the legislature and not of the courts, to revoke the so-called donation.

Having reached the conclusion herein expressed, let us direct our attention to the proof offered by defendant to overcome the presumption that it sold, used or consumed all

of the gasoline it imported into this State between January 1, 1935, and June 1, 1938.

The State alleges that during this period defendant imported into the State for distribution, sale or use 52,444,125.35 gallons of gasoline or motor fuel, all of which was subject to the tax; that defendant reported and paid the tax on 50,852,263.05 gallons thereof, after deducting 3% provided by the statute, but failed to pay the tax on the difference of 1,591,862.50 gallons.

Defendant in its answer denies these allegations. During said period of time it says that it imported 177,451,523 gallons of gasoline through its terminal at Westwego, and exported in interstate and foreign commerce 133,485,334 gallons; that it shipped from its Westwego terminal to customers and to its bulk oil storage and marketing stations in Louisiana 41,663,590 gallons of gasoline and that in addition it purchased from bonded dealers in the state about ten million gallons. That of the quantities of gasoline so shipped to its bulk oil storage and marketing stations and purchased from other dealers during said period, respondent sold, used and consumed in this state 51,479,763.05 gallons, upon which all taxes were paid.

That during said period it sustained losses in handling, storage and shipment at the Westwego terminal, 1,646,551.3 gallons, upon which no tax can be collected, as this quantity of gasoline was not sold, used or consumed.

The defendant on the trial of the case admitted that its figures, as set out in its answer, relating to its losses in handling, are incorrect to the amount of 1,666 gallons of gasoline, representing 790 gallons used in its gasoline engines, 644 gallons withdrawn from stock and not recorded as sales and 232 gallons, representing overage to customers by reason of defective pumps.

This leaves a figure of 1,609,441.03 gallons which defendant claims represents its losses in handling.

To show this loss, defendant offered the testimony of Mr. J. A. Ahearn, its district accountant, and in connection with his testimony the defendant offered and filed in evidence two statements, one marked "Ahearn-1" and the other "Ahearn-2". According to the first of these statements, which Mr. Ahearn swore to be correct, the defendant's total stock losses for the period involved, were 1,611,107.3, whereas the audit of defendant's records by certain representatives of the Department of Revenue for the State shows that for the same period of time the alleged stock losses amounted to 1,591,862.3 gallons or a difference of 19,245 gallons, that is 19,245 gallons less than the statements offered by defendant show as stock losses.

The item on this statement listed "Miscellaneous Stock Audits", amounting to 25,355 gallons seems to represent the same credit or asserted loss as those listed on the statement marked "Ahearn—2".

Plaintiff claims that these statements really disclose defendant's "shortage", while the defendant maintains that they represent its "losses."

It seems to me that the testimony offered by the defendant as to the quantity of gasoline lost in handling is sufficient to overcome the statutory presumption that this quantity of gasoline was actually sold, used or consumed by the defendant.

It must be remembered that the testimony shows that during the period of time set out in the petition the defendant handled in this State for all purposes 203,547,700 gallons of gasoline. It is true that some of it was exported. However, even so the alleged loss, it seems to me, is by no means unreasonable or out of proportion to the total number of gallons of gasoline handled by the defendant. There is certainly nothing in the testimony offered by the State that would justify the Court in disregarding the statements offered in evidence by the defendant showing their losses during the period of time covered by this law suit.

There is, on the other hand, testimony tending to show that the losses claimed are customary and normal.

In the circumstances the Court will accept said statement as sufficient proof to overcome the presumption that all of the gasoline imported by the defendant in this State was actually sold, used or consumed.

Having held that a tax does not have to be paid on gasoline lost in handling, by reason of evaporation, leakage, spillage, etc., and being of the opinion that the defendant company has shown with a reasonable degree of certainty that its losses equalled the amount referred to, that is 1,611,107.3, less 1,666 gallons, I have concluded to deny the State's claim for the tax upon this number of gallons of gasoline, and to award judgment only for the tax on 1,666 gallons, plus the penalty and attorney's fees prescribed by the statute.

As to the sale of gasoline by the defendant to the Pan-American Petroleum Corporation, the evidence shows that the total quantity of gasoline sold by the Sinclair Refining Company to the Pan-American Petroleum Corporation without paying the tax was 2,119,644.00. Of the above quantity there was delivered to jobbers 928,249 gallons, leaving the sum of 1,191,395 gallons that were sold by the defendant and which went to the Pan-American bulk plants and comingled with other gasoline.

The defendant admits that at the time of and prior to the sale of this gasoline it failed to pay the tax thereon.

The plaintiff is not now claiming this tax, as presumably it was paid by the Pan-American Petroleum Corporation, the purchaser, or satisfactory adjustment thereof was made with the State. The State's claim is that the tax on this quantity of gasoline was not paid by defendant as and when the law required its payment; this the defendant admits but it says that as the tax has nevertheless been paid, the demand for the penalty is illegal, as the penalty can be sued for only in connection with the suit for the tax itself. In the alternative defendant says that if the penalty can be separately, demanded and collected as a matter of law, the

same should not be allowed because, although it did not pay the tax it was in good faith in failing to pay the same, knowing that the purchaser would pay the tax. The defendant insists that after all the State lost nothing.

I have been referred to no authority to support defendant's position relating to the State's right to sue separately for the penalty and attorney's fees, the tax having previously been paid.

I don't question for a moment the honesty of defendant's officers in failing to pay this tax when due or in making the sale without paying the tax. I do say, however, that its failure to do so was the result of gross carelessness and was a violation of the plain provisions of the law.

On February 7, 1936, the Sinclair Refining Company addressed a letter to the Supervisor of Public Accounts, reading as follows:

"Supervisor of Public Accounts,
State of Louisiana,
Baton Rouge, La.
Dear Madam:

Our people have worked out an arrangement with the Pan-American Petroleum Corporation whereby our Company will deliver gasoline into tank cars or barges of Pan-American at our terminal at Westwego for shipment to the terminals, bulk stations or customers of Pan-American in and out of Louisiana. We would like to be advised whether Pan-American may account to the State of Louisiana for the tax involved in these deliveries in lieu of paying the tax to our company, which would in turn have to account to the State of Louisiana for such tax.

Please address your reply for the attention of the undersigned, whose name appears in the upper right-hand corner of this letter.

Very truly yours,

SINCLAIR REFINING COMPANY,
By FRANK G. DRISCOLL,
Attorney."

On February 10, 1936, the Supervisor of Public Accounts, acting through Mr. J. F. Boyle, Assistant for Motor Fuel Tax Division, replied to this letter as follows:

"February 10, 1936.

"Sinclair Refining Company,
630 Fifth Avenue,
New York, N. Y.

GENTLEMEN:

Attention: Mr. Frank G. Driscoll, Attorney.

This will acknowledge receipt of your letter of February 7th, File ELD: B, with reference to making certain deliveries of gasoline to the Pan-American Petroleum Corporation from your terminal at Westwego, Louisiana.

Replying, we cannot accede to the request made for the reason that the tax on gasoline for the State of Louisiana is levied against the dealer; that is, the first person, firm, corporation, or association of persons, handling the gasoline or motor fuel. Further, Section 6 of the gasoline tax law reads: 'It is the purpose of this Act to centralize the collection of the tax herein authorized in the hands of those who originally dispose of gasoline or motor fuel. * * *' (See Section 2 on page 4, and Section 6 on page 9 of the pamphlet enclosed.)

In view of this, the Sinclair Refining Company is liable to this office for the tax on all gasoline sold by them originating within the State and destined for delivery in the State.

Regretting not being able to serve you, I am,

Yours very truly,

SUPERVISOR OF PUBLIC ACCOUNTS,
By J. F. BOYLE,
Assistant for Motor Fuel Tax Division."

Notwithstanding this reply, however, the defendant in this case continued after February 10, 1936, to sell and deliver to the Pan-American Petroleum Corporation gasoline without first paying the tax thereon, leaving it to the purchaser to account to the State for the same.

As stated, in Volume, page 1956, Words and Phrases, First Series:

> "'Delinquency' is only another name for gross neglect to perform a lawful obligation, or wilful default, either of which is a proper subject for penalties. * * *"

In other words, delinquency, as applied to debt, simply means past due and unpaid at the time appointed by the law or fixed by contract. There can be no question that there was a delinquency in this case and that under the plain provisions of the statute, the defendant should suffer the penalty for the same.

Judgment will therefore be rendered herein in the sum claimed by plaintiff for the penalty resulting from said delinquency in payment and the attorney's fees thereon.

This brings us to a consideration of the claim of the State for the sum of $1,235.75, representing the tax at the rate of one (1¢) cent per gallon on 102,975 gallons of kerosene alleged to have been used as tractor fuel, amounting to $1,029.79, and the penalty for delinquency at the rate of 20% of the amount of tax, or the sum of $205.96, together with 10% as attorney's fees on both tax and penalty.

The plaintiff in the brief filed on its behalf admits that proper affidavits were timely filed covering 37,108 gallons of this kerosene and that its claim for the tax on this amount should be denied. However, the plaintiff insists that it is entitled to the tax, penalty, etc. on 4,720 gallons of kerosene covered by affidavits that were witnessed by a notary public prior to the actual date of the sale thereof and to the tax on 61,151 gallons thereof, for the reason that the affidavits relating thereto were not executed within the ninety-day period required by law.

The evidence shows that the affidavits relating to 4,720 gallons were, as claimed by the State, dated prior to the date of sale and that the affidavits relating to 61,151 gallons of kerosene were, as claimed by the State, not timely filed. As to the first item, that is, the 4,720 gallons I do not think that the defendant should be penalized for the neglect of the notary public who witnessed these affidavits. Even though the affidavits may have been dated

prior to the date of the sale, it seems that they were timely filed and I think that it would be unfair to disallow this deduction, as the contents of the affidavits were not denied. As to the 61,151 gallons, the evidence is clear that the proof relating to the disposition and distribution of this much kerosene was not filed within the time required by law, and therefore the plaintiff should have judgment representing the tax, penalty and attorney's fees on this amount, and judgment will be rendered for that amount.

For the reasons assigned judgment will be signed awarding the plaintiff judgment (1) for the tax, penalty and attorney's fees on 1,666 gallons of gasoline which were sold, used or consumed by the defendant and upon which admittedly no tax has been paid; (2) in the sum of $11,913.95, representing 20% on $59,569.75, the tax which the defendant should have paid the State on 1,191,395 gallons of gasoline sold to the Pan-American Petroleum Corporation, at the rate of 5¢ per gallon, $2,799.68 representing 20% of the parish tax on 699,922 gallons of gasoline at 2¢ a gallon, and 10% attorney's fees on the above two sums, all amounting to the sum of $16,184.99; (3) in the sum of $611.51, being the tax due on 61,151 gallons of tractor fuel or kerosene at the rate of 1¢ per gallon, $122.30, representing the penalty for delinquency and $73.38 attorney's fees on $733.81, being the amount of the tax and penalty, the defendant to pay all costs of this suit.

In all other respects the demands of the State are denied and rejected.

(Sgd.) Charles A. Holcombe,
Judge, 19th Judicial District Court,
Division "B".

EXHIBIT "B".

No. 35371

STATE OF LOUISIANA

versus

SINCLAIR REFINING COMPANY

January 9, 1940.

Appeal from the Nineteenth Judicial District Court, Parish of East Baton Rouge; Hon. Charles A. Holcombe, Judge

ODOM, J.:

This is a summary proceeding brought by the State, under Act 14, Second Extra Session of 1935, against the Sinclair Refining Company, engaged in this State as a "dealer" in gasoline, kerosene, and petroleum products. The total amount claimed by the State is $135,758.36, with interest from the time of judicial demand, plus 10 per cent attorney's fees.

The demand was made after the State audited defendant's books and accounts, the audit covering a period beginning January 1, 1935, and ending June 1, 1938. The State alleged that during that period the defendant imported into this State for sale, use, or consumption, 1,591,862 gallons of gasoline, or a total gallonage, after deducting the statutory 3 per cent "for losses in handling", of 1,544,105 gallons, on which it had not paid the tax at the rate of 5¢ per gallon, this tax amounting to $77,205.27. The State alleged further that the defendant should have paid, but did not pay, the parish tax of 2¢ per gallon on 699,922 gallons, the tax amounting to $13,998.46; that defendant is due an inspection fee of 1/32 of one cent per gallon, amounting to $497.45, making a total claim of $91,701.18, plus 20 per cent penalty amounting to $18,240.75, and plus 10 per cent attorney's fees on the total amount due.

In addition to this amount, the State demanded $24,580.00, representing a penalty of 20 per cent for delinquency on

$102,802.75, this being the amount of the tax on 2,056,054 gallons of gasoline sold by defendant to the Pan-American Corporation, which amount of tax it is alleged was not timely paid according to the requirements of the statutes, together with 10 per cent attorney's fees. The State claims further $1,235.75, with 10 per cent attorney's fees thereon, representing tractor fuel refunds which were disallowed for the period from June 1, 1936, to June 1, 1937, there being 102,979 gallons involved.

As to what may be referred to as the State's principal demand, which was for the amount of the tax on gasoline, defendant in its answer denied liability. It alleged that, during the period covered by the State's audit, it imported through its terminal at Westwego, this State, 177,451,523 gallons of gasoline, and imported to its other places of business in the State 11,697,644 gallons, or a total of 189,149,167 gallons; that of this gallonage it exported interstate 133,485,334 gallons; that it shipped intrastate from its Westwego plant to its bulk stations in Louisiana 41,663,590 gallons; that it purchased from other bonded dealers in this State 14,262,851 gallons.

But defendant alleged that, after taking into consideration its inventories of the amount on hand at Westwego and its bulk plants, there was a shortage in its stock on hand, out of the whole quantity handled, of 1,646,551 gallons, and it is alleged that this shortage was due to divers and sundry losses of gasoline in handling, storage, and shipment, and alleged that such losses occurred in such manner and under such circumstances that the gasoline could not have been sold, used, or consumed in the State. In other words, the defendant claimed credit for this shortage.

Defendant further alleged that it had posted a surety bond with the Collector of Revenue, and that, because it had done so, it was not required, by the various statutes providing for the levy and collection of taxes on gasoline and certain mentioned petroleum products, to pay said taxes on any of the gasoline and other products mentioned except such gallonage as was actually sold, used, or consumed in the State, and that it was relieved of the obligation to pay taxes on gasoline or motor fuel immediately upon its

importation, manufacture, or compounding within the State; that the statute as relates to bonded dealers provides that they shall report and pay taxes upon the twentieth day of the month succeeding the month in which the sale, use, or consumption takes place. In other words, the contention of the defendent, as set up in its pleadings, is that, because it has furnished the bond required by the statutes, it is not required to pay the tax immediately after the gasoline or other motor fuel is received into the state, but is permitted to delay payments until such fuel or products are actually sold, used, or consumed in the State, and is required to pay the tax on only such products as are actually sold, used, or consumed.

Before answering to the merits, the defendant filed an exception of no cause or right of action, a plea to the jurisdiction of the court *ratione materiae*, and attacked the constitutionality of Act 14, Second Extra Session of 1935. These exceptions were overruled by the trial judge on the ground, as stated by him in his written opinion, that they "are substantially the same exceptions that were filed by the defendant in the suits entitled State of Louisiana vs. Standard Oil Company of Louisiana, reported in 188 La. 978, 178 S. 601; and 190 La. 338, 182 So. 531, respectively."

There was judgment overruling all exceptions and pleas filed by the defendant, and upholding the validity of Act 14, Second Extra Session of 1935, and judgment in favor of the State, and against the defendant, as follows:

> "(1) For the tax, penalty and attorney's fees at the rate of seven cents (7¢) per gallon on 1,666 gallons of gasoline, plus penalty for delinquency thereon at the rate of 20%, and 10% additional as attorney's fees on both the tax and penalty amounting to the total sum of $153.93, which amount represents gasoline which was sold, used or consumed by the defendant, and upon which no tax has been paid.
>
> "(2) In the sum of $11,913.95, representing 20% penalty on $59,569.75, the tax which the defendant should have paid the State on 1,191,395 gallons of gasoline sold to the Pan-American Petroleum Corpora-

tion at the rate of five cents (5¢) per gallon; in the sum of $2,799.68, representing 20% penalty on the parish tax on 699,922 gallons of gasoline at two cents (2¢) a gallon, and the additional sum of 10% attorney's fees on the above two amounts, all amounting to the sum of $16,184.99.

"(3) In the sum of $611.51, being the tax due on 61,151 gallons of tractor fuel or kerosene at the rate of one cent (1¢) per gallon; in the sum of $122.30, representing the penalty for delinquency thereon at the rate of 20%; and in the sum of $73.38, representing attorney's fees on the aggregate amount of tax and penalty, which tax and penalty amount to the sum of $733.81, or the total sum of $807.19, representing the tax, penalty and attorney's fees on the tractor fuel or kerosene.

"(4) It Is Further Ordered, adjudged and decreed that the State do have and recover legal interest on the above amounts from the date of judicial demand until paid, and that the defendant pay all costs of this suit.

"(5) It Is Further Ordered, adjudged and decreed that in all other respects the demands of the State be, and the same are hereby denied and rejected."

We shall not discuss the ruling of the trial judge holding that Act 14 of the Second Extra Session of 1935 is constitutional further than to say that his ruling was correct. The attacks made on the validity of that act in this case are the same, or practically the same, as those made in the case of State of Louisiana v. Standard Oil Company of Louisiana, 188 La. 978, 178 So. 601, where it was held that the act is constitutional. We adhere to our holding in that case that the statute is constitutional.

The exception of no cause of action urged is levelled at the proposition that the State, through its proper officers, did not comply with Section 7, Act 6, of the Extra Session of 1928, as amended, before filing suit. That section of the statute provides that the Supervisor of Public Accounts (now the Collector of Revenue) shall have power to re-

quire dealers in gasoline, or other motor vehicle fuel, to furnish additional information deemed necessary for the purpose of collecting the tax, and shall have authority to examine the books, records, and files of such dealers, and authority and power to examine witnesses in order to ascertain whether such dealers in making their reports have complied with the statute; and provides further that, if the Collector of Revenue is not satisfied, after making the examination, that the reports are correct and have been made according to law, he shall correct the return and shall compute the tax as in his judgment it should have been computed by the dealer, and shall certify the correct amount as found by him to his department, and "shall concurrently notify such person, firm, corporation or association of persons of such facts"; and, in the event such dealer shall not within five days after such notification "make a correct return and pay the full amount due," the Collector of Revenue shall bring suit in the name of the State to collect the correct amount from such dealer, with penalties.

Counsel for appellant pointed out that, in the case of State of Louisiana *v.* Standard Oil Company, 188 La. 978, 178 So. 601, it was said by this court that the provisions of Section 7 of the act, as amended, were complied with, and it is argued that the court held in effect that the statute in this respect must be complied with; otherwise the State would have no cause or right of action to proceed against an alleged delinquent dealer.

What we said in that case about the requirement of this section of the statute was in connection with what the State alleged. We did not hold, or intend to hold, that a literal compliance, under all circumstances, with that section of the statute was necessary in order that the State have a standing in court in a case of this kind. While we do not intend to absolve the Collector of Revenue from the duty imposed upon him by this section of the statute, we do hold that, under the circumstances shown to exist in this case, the exception of no cause or right of action, based solely on the fact that the Collector of Revenue did not submit to the defendant a corrected statement of the amount of the tax which he found due, should not be sustained.

The record shows that there was a dispute between the State and the defendant as to the correct amount due. The State made a complete audit of the defendant's records, and the defendant knew what the purpose of that audit was. The defendant knew that the State claimed that it should pay the tax on the total amount of gasoline manufactured or imported into the State for sale, use, or consumption, less the statutory 3 per cent for losses in handling. The contention of the defendant is, and always was, that it was entitled to deduct the statutory 3 per cent and then pay the tax only on such quantity of gasoline and other products as were actually sold, used, or consumed in the State. The controversy between the State and the defendant revolved mainly around the method of computing the tax. Therefore, it would have been a vain and useless procedure for the State to have submitted to the defendant what the statute refers to as a corrected report. The defendant does not now claim that it would have acceded to the State's demand if it had been made. In fact, the defense made in this case clearly shows that it would not have done so.

The record shows that defendant had ample time after the institution of this suit to prepare for and make its defense. Its constitutional rights have not in any sense been invaded. Our opinion therefore is that the exception of no cause or right of action was properly overruled by the trial judge.

The main issue involved is whether the defendant is due the amount of tax on gasoline which the State claims. Whether it is due the State the amount claimed depends upon the question whether or not the dealer must pay the tax on the total quantity of gasoline manufactured or imported into the State for sale, use, or consumption therein, less the statutory 3 per cent deduction for losses in handling, or whether he is required to pay the tax on the amount of gasoline actually sold, used, or consumed, less the statutory 3 per cent to cover his losses in handling. Counsel for the State say in their brief that the short question the court is called upon to answer is this:

> "Does the Gasoline Tax Law (Act 6 E. S. 1928, as amended, and Act 1 Extra Session 1930) authorize the

dealer to deduct for stock losses or evaporation in addition to the 3% allowance provided by the statute to cover 'losses in handling'? What losses does the phrase 'losses in handling' include and cover?

The trial judge in his written opinion stated the main issue involved as follows:

> "The plaintiff's contention is that the tax is due and payable by the 'dealer' on every gallon of gasoline he brings into the State for sale, use or consumption in the State, less 3%, regardless of how much is lost by evaporation, shrinkage or leakage, whereas the defendant claims that the tax is due only upon that quantity of gasoline imported into the State that is actually sold, used or consumed, less the statutory deduction of 3%."

Section 1, Act 6, Extra Session of 1928, which section has twice been amended, levies a tax of 4¢ per gallon on all gasoline or motor fuel sold, used, or consumed in the State for "domestic consumption," the same to be collected as the act in other sections provides. Section 1 of the act contains this provision:

> "Provided that an allowance of three per cent of the total gallonage *received* during every calendar month shall be made and deducted by the *dealer to cover his or their losses in handling such motor vehicle fuel.*"

That section further provides that:

> "a refund shall be made to said dealer for the tax paid on all motor vehicle fuel *which after such payment* shall be lost or destroyed by fire, lightning, flood, tornado, windstorm, explosion or other accidental or providential cause." (Italics ours.)

Act 1, Extra Session of 1930, which was adopted as a constitutional amendment and is written in full into the Constitution as Article VI-A, levied an additional tax of one cent per gallon on all gasoline, benzene, naphtha, or

other motor fuel, as defined in the act, when sold, used, or consumed in the State of Louisiana, for the benefit of education and the ports of New Orleans and Lake Charles.

Section 1 of this act, like Section 1, Act 6, Extra Session of 1928, provides that an allowance of 3 per cent "of the total gallonage *received* during each calendar month" shall be made and deducted by the dealer "to cover his or their losses in handling such motor vehicle fuel," and that a refund shall be made to such dealer or dealers for the tax paid on motor vehicle fuel, which "after such payment" shall be lost or destroyed by fire, lightning, flood, tornado, explosion, windstorm, or other accidental or providential causes. This particular provision is the same, word for word, as that contained in the 1928 act. Section 1 of the 1928 act was amended and reenacted by Act 16 of the Regular Session of 1932, and the clause in the amending act relating to the 3 per cent allowance is a verbatim copy of that in the 1928 act. Section 1 of the original act was again amended by Act 34 of the Regular Session of 1934, but no change was made in the 3 per cent deduction clause.

The trial judge, commenting on these clauses in the acts referred to said:

> "It is very true that this proviso uses the words 'their losses in handling' in referring to the 3% allowance, yet, in view of all the decisions of the appellate courts with respect to this allowance clause, I am of the opinion that these words are not to be literally construed. On the contrary, I am of the opinion that the 3% referred to is an arbitrary deduction only and has no relation to losses actually sustained in handling. In other words, that the legislature adopted a purely arbitrary method of taxation, that is, by levying the tax upon 97% of the amount of gasoline sold, used or consumed instead of upon all of the gasoline sold, used or consumed. If in doing this the legislature, in effect, made a 'donation' to the gasoline 'dealers', it is the duty of the legislature and not of the courts, to revoke the so called donation."

Entertaining such view, the judge ruled against the State and in favor of the defendant on the main issue involved.

It is true, as the judge said, that the Legislature did, in fixing the gallonage of motor vehicle fuel on which the tax should be paid by the dealers, make an arbitrary or flat deduction of 3 per cent from the amount received by them for sale, use, or consumption in the State. The result is that the dealers are required to pay the tax, not on 100 per cent of the gallonage received, but on only 97 per cent of it. But the 3 per cent deduction is an "allowance" and not, in effect, a donation to the dealers.

No one has suggested any reasons, and none can be found in the statutes themselves, nor can we think of any, why the law-makers should have intended to make an out-right donation to the dealers of the tax on 3 per cent of the total gallonage of motor vehicle fuel received by them for sale, use, or consumption in the State. Conceding that the Legislature had the right, if it saw fit, to levy the tax on only 97 per cent of the gallonage received by the dealers and thereby, in effect, donate to them the tax on the remaining 3 per cent, the question why it should have done so naturally arises. We cannot hold that the Legislature did intend this arbitrary deduction to be, in effect, a "donation" without assigning some reason to support the holding. Since we are unable to assign a reason for so holding, we must interpret the statute to mean what it says, and that is that the 3 per cent deduction was intended to cover the dealer's losses in handling.

There was a reason for making a 3 per cent deduction, and the reason is found in the language of the statutes; and there was a reason for making the "allowance" for the purpose stated.

Motor vehicle fuel, especially gasoline, cannot be handled without losses from various causes, such as leakage, spillage, and evaporation. The history of the controversy leading up to the inclusion of the 3 per cent deduction clause in the statutes is a matter of common knowledge. The "dealers," as that term is defined in the statutes, contended, and the Legislature conceded, that they were entitled to some deduction or allowance for their unavoidable losses in

handling, and the amount of the allowance was agreed upon and written into the act.

The original act was adopted on December 18, 1928. In the month of March of the following year, there was some correspondence between Mr. Conway, then Supervisor of Public Accounts, and the attorney for one of the major dealers of the State, as to the correct method of computing the tax. Mr. Conway's letter to the attorney was copied by us in State v. Standard Oil Co., 190 La. 338 (351), 182 So. 531. In Mr. Conway's letter, he referred to the 3 per cent as an "allowance for losses in handling motor vehicle fuel." We have been called upon on numerous occasions to interpret the so-called gasoline tax statutes, and, taking cognizance of our own opinions, we know that never before has it been contended by any of the dealers that the 3 per cent "allowance" was intended to be, or that it was in effect, for a purpose other than to cover their losses in handling.

The very able trial judge, after expressing doubt as to the correct interpretation of the provisions of the various gasoline tax statutes relating to the correct method of computing the amount of the tax, said:

> "It is to be hoped that at the final termination of this case the tax collecting authorities, as well as the gasoline tax payers will be enabled to know beyond any doubt whether or not the 'dealer' in gasoline must pay the tax (less the 3% deduction allowed under the statute), upon gasoline imported in to this State for sale, use or consumption in this State or upon gasoline actually sold, used or consumed in the State."

We intended to, and thought we did, make this point clear in our opinion in the Standard Oil Company case, reported in 190 La. 338. Evidently we failed, because there is still confusion and doubt. So, in order to remove doubt as to our interpretation of the meaning of the various provisions of all the statutes relating to the payment of the tax and the method of computing the amount of it, we now hold that "dealers" (as defined in the acts) in gasoline or other motor vehicle fuel must pay the tax on the total gallonage

manufactured or imported into this State for sale, use, or consumption therein, less the 3 per cent which the statutes allow dealers to deduct to cover their losses in handling such motor vehicle fuel. In other words, the dealers must pay the tax on 97 per cent of the total gallonage manufactured or imported into the State for sale, use, or consumption in the State, and not on the gallonage actually sold, used, or consumed.

We have reached this conclusion after a most careful study and consideration of each and every one of the so-called gasoline tax acts. It is true, we think, as Judge Borah stated in his opinion in the case of Texas Co. v. Wilkinson et al., 21 Fed. Supp. 771, that some of the acts are not as artistically drawn as they might have been. The text of some of them is not free from all ambiguity. The meaning of some of the clauses is dubious. But, adhering to the rule for the application and construction of laws laid down by the Revised Civil Code in Articles 16, 17, and 18, we have, without serious difficulty, reached the conclusion expressed above. Article 16 of the Code reads as follows:

> "Where the words of a law are dubious, their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may be compared, in order to ascertain their true meaning."

And Article 17 says:

> "Laws in *pari materia*, or upon the same subject matter, must be construed with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another."

We have construed each act as a whole and the different acts with reference to one another. Where words and phrases of dubious meaning were found, we have examined the context, compared the phrases and sentences, all for the purpose of ascertaining the legislative intent as to the method of computing the amount due. We have considered the "reason and spirit" (Civil Code, Article 18) of the acts, especially the clauses making an allowance of 3 per cent of

the gallonage "received," to be made and deducted by the dealer "to cover his or their losses in handling such motor vehicle fuel," and those relating to the method of computing the amount due.

When thus construed, it manifestly appears that the Legislature intended the 3 per cent deduction to be an "allowance" (that is the word used) to "cover" the dealer's entire "losses in handling."

It must be noted that the law-maker used the word "cover," which, as here used, was evidently intended to mean "To extend over; to be sufficient for; to comprehend, include or embrace; to account for or solve; to counterbalance" (Webster's New International Dictionary); or, as defined in the Century Cyclopaedia and Dictionary, Volume II, "To be equal to, be of the same extent or amount, be coextensive with; as 'the receipts herein cover the expenses'; to counterbalance; compensate for; as, 'to cover one's loss' ".

Section 1 of the statute, as finally amended by Act 34, Regular Session of 1934, provides that this 3 per cent deduction is to be made from "the total gallonage received during every calendar month." This means that the deduction must be made from the total amount of the dealer's receipts and not from the total amount of his sales, as counsel for defendant argue.

As we have already stated, the members of the Legislature realized that dealers were entitled to some deduction to cover their losses in handling. They evidently thought that an allowance of 3 per cent would be fair to both the State and the dealers, because they wrote that percentage into the law. Whether that percentage was a mere estimate, or whether it was based on data showing the experience of dealers in handling gasoline or the experience of other States where a similar tax had been levied at that time, we do not know. But the fact is that they adopted that percentage and wrote it into the act. It was a flat allowance to cover the dealer's losses in handling. It may have been too high or too low. If it was too high, the State lost and the dealers gained, and, if it was too low, the dealers lost and the State gained. As a matter of fact, the allow-

ance seems to have been too high. In the Standard Oil Co. case, reported in 190 La. 338, it was admitted that the dealer's losses in handling were less than 3 per cent. (See concurring opinion of Justice Higgins.) In the case at bar, defendant's losses in handling, according to the brief of its counsel, were much less than 3 per cent. We quote from page 30 of counsel's brief:

> "The average loss at Westwego from all causes including evaporation, temperature changes, spillage and leakage showed an average loss of 91/100 of 1%. * * * The average loss of everything in Louisiana, including bulk stations and Westwego is 8/10 of 1%."

But the State seems to be satisfied with the bargain it made with the dealers. The original act containing the 3 per cent allowance clause was adopted in 1928. Section 1 of that act has been amended several times, the last amending act being Act 34 of 1934. But there has never been any change in the 3 per cent deduction clause or in the wording of the statute as to the purpose for which the allowance was made.

There was a reason for making this flat deduction. In commenting on this clause of the statute and the reason for such a deduction, we said in the Standard Oil Co. case last above cited:

> "The reason why this was done may well be imagined. It was evidently to the advantage of the State, if deductions were to be made at all, to have the adjustment for such losses made once and for all at the source and at the time the taxes were paid. This method obviated the necessity for future checking and accounting in order to ascertain actual losses. The members of the Legislature no doubt foresaw that, if the matter of adjustment was left open for future determination, there would be disputes and controversies between the dealers and the administrative officers as to the exact amount of the losses sustained, and that the expense of following up the commodities and checking would be so great that any other method than the one adopted would be wholly impracticable.

> "But whatever may have been the reason for adopting this method of settlement, the fact remains that the Legislature did adopt it, and it is a significant that, whereas the acts are replete with provisions authorizing and directing the Supervisor of Public Accounts (now Collector of Revenue) to check and audit the books and accounts of the dealers for other purposes, yet nothing is said about his checking their accounts in order to ascertain what counsel refers to as 'prospective losses' in handling."

One of the arguments made by counsel for the State in that was the provision for the 3 per cent deduction to cover losses in hadling had reference to "prospective losses" up to, but not exceeding, 3 per cent, and that the dealers were entitled to credit for such losses in handling as they may have actually sustained, and no more. We there rejected that theory, holding that the Legislature did not contemplate that any adjustment to cover losses in handling should be made, except the flat allowance of 3 per cent for that purpose.

In counsel's supplemental brief, they say that defendant does not contend "that the State did not have the right to levy a tax based upon an accounting of the receipts with a definite limitation on handling losses such as is common in many of the States in this country. We contend that the State Legislature might have passed a valid measure along those lines. Our point is that it did not do so; that it levied a tax upon the dealer and based the amount of the tax on the amount he should *sell, use* or *consume.*"

Counsel's statement that the State did not set "a definite limitation on handling losses" is in the teeth of the law. The State did just that. It made an allowance of 3 per cent to "cover his or their losses in handling."

In support of their contention that the State based the amount of the tax on the amount "he should sell, use or consume," counsel quote that portion of Section 22, Article VI, of the Constitution, which provides that "On gasoline, benzine, naphtha and other motor fuels, as defined by law, when sold, used or consumed in the State of Louisiana,

there shall be levied a tax not to exceed four (4¢) cents per gallon, to be collected as prescribed by law."

What the Legislature evidently understood that to mean, and what it does mean, is that the tax was levied on all such motor fuel as was destined for use or consumption in this State, or for domestic consumption, and not on such products as were manufactured in, or imported into, the State for export.

In all of the acts, the tax is levied on all motor fuel "sold, used or consumed in the State of Louisiana *for domestic consumption.*" Each of the acts specifically recited that "It is not the intention of this Act to levy a tax on gasoline or motor fuel produced, refined, manufactured, blended, compounded or imported in this State for export."

What the framers of the Constitution and the Legislature meant by using the comprehensive terms "when sold, used or consumed in the State of Louisiana" was that the tax was levied only on such products as were intended for domestic consumption and not for export. Each of the acts uses the phrase "for domestic consumption" in the clause imposing the tax.

Act 34 of the Regular Session of 1934 amends and reenacts Sections 1, 2, 4, 6, and 7-E of the 1928 act, as amended by Act 8 of 1930 and Act 16 of 1932. The 1934 act makes it compulsory for all dealers to furnish to the Supervisor of Public Accounts a statutory surety bond, guaranteeing the payment of all taxes, penalties, and costs levied by the act, before engaging in the business of dealer. Section 4 of that act, after stating that the giving of the bond is compulsory, goes on to state:

> "Said bond having been furnished and accepted, as provided herein, the dealer furnishing same shall be required to pay the tax at the time of making reports to the Supervisor of Public Accounts, as herein required, only on such gasoline or motor fuel actually sold, used or consumed in this State, during the period for which said reports are made and in which event the tax herein levied shall become delinquent the day after the date herein fixed for the filing of said reports."

This part of the act, construed alone and without reference to other parts of it, would support counsel's contention that the Legislature intended that the tax should be paid only on such motor vehicle fuel as is actually sold, and that the tax is to be paid as and when sales are made. But this part of the act is inconsistent and out of harmony with other parts of it.

The above quoted provision, which is relied on by counsel for defendant, is found in the 1934 act, which makes the furnishing of bond compulsory and prohibits anyone who has not posted the bond from engaging in the business of "dealer". All "dealers" are now bonded. Therefore, whatever is found in this 1934 act relating to the time for making the 3 per cent allowance or to the time for paying the tax must have reference to bonded dealers because there are now no dealers except "bonded dealers."

This 3 per cent deduction clause is found in the 1934 act, written verbatim as it was written in the 1928 act, which did not require dealers to give bond. Now, if that clause be construed to mean that the Legislature intended that the deduction should be made from the total gallonage "actually sold", and that therefore the tax should be paid on the gallonage actually sold and paid when sales are made, it does not harmonize and is inconsistent with the one which immediately follows it, which reads as follows:

> "That a refund shall be made to said dealer for the tax paid on all motor fuel which after such payment shall be lost or destroyed by fire, lightning, flood, tornado, wind-storm, explosion or other accidental or providential cause.
>
> "Provided, further, that the said refund shall be paid by the Supervisor of Public Accounts upon proper showing and authentic proof of destruction and shall be paid from the funds in the hands of the Supervisor of Public Accounts, which have been collected under this Act and which have not been paid by the Supervisor of Public Accounts to the State Treasurer."

If the Legislature had not intended that the tax should be paid in advance of actual sales, we can conceive of no

reason why it should have inserted these refunding clauses into the 1934 act, because it is certain that there would be no occasion for a refund if the tax were not paid until sales were made. These clauses relating to the 3 per cent "allowance" from the total gallonage "received", and to the refunds to be made, are utterly inconsistent with the theory that the deduction was to be made from, and the tax to be paid on, such gallonage as is actually sold.

Furthermore, Section 6 of the act, which declares the purpose of the statute, provides:

> "It is further the purpose of this Act to require the payment of the tax on any gasoline or motor fuel to be sold, used or consumed in this State immediately upon the producing, refining, manufacturing, blending, compounding or importing of such gasoline or motor fuel, unless a bond, as provided herein, is furnished to guarantee the payment of said tax."

The tax is to be paid on any gasoline or motor fuel "*to be sold,* used or consumed in this State", not that actually sold, used, or consumed, and it is to be paid "immediately upon the producing • • • or importing" of such fuel into the State "unless a bond, as provided herein, is furnished to guarantee the payment of said tax."

What the clause "unless a bond • • • is furnished "means is that, if the bond is furnished, the tax need not be paid "immediately", but may be postponed until the reports of the dealer are made on the 20th day of each month, as required by Section 4 of the act. In so far as the time of making the payments is concerned, the effect of giving the bond is to allow the dealer a few days of grace for making the payments. This is shown by the following clause, found further on in Section 6 of the Act:

> "And it shall be the duty of the Supervisor of Public Accounts to accept a bond of any solvent surety company authorized to operate in the State of Louisiana, as herein provided, *in lieu of the immediate payment of the tax.*" (Italics ours.)

Section 4 of the act contains the following provision:

> "provided, further, that any dealer bringing gasoline or motor fuel into the State of Louisiana for sale, use or consumption therein, who has not furnished bond as provided in this Act, the furnishing of said bond being compulsory, shall immediately pay to the said Supervisor of Public Accounts the tax levied herein which is hereby made due and payable immediately upon same coming within the boundaries of this State."

This paragraph indicates that the tax is due when the gasoline is brought into the state for sale, use, or consumption therein.

The last above quoted clauses of the act are ambiguous and confusing. For instance, it is provided that the tax must be paid by the dealers immediately upon their bringing gasoline or other motor fuel into the State for sale, unless bond is given, and then provides that the giving of the bond is compulsory. If the giving of the bond is compulsory and no person is permitted to engage in the business of dealer without furnishing the bond, it follows that all dealers are bonded, and that therefore none of them is required to make immediate payment of the tax. And, with reference to the time of paying the tax, the word "immediately" appears over and over again in both Sections 4 and 6 of the act.

Giving effect to all the various provisions of the act, if possible, as we must do under the cardinal rules of construction, we conclude that what the Legislature intended was that dealers should pay the tax on all motor fuel manufactured or brought into the State for sale, use, or consumption in the State, or, as the act says, for domestic consumption, and that all dealers, who are now required to give bond, shall pay the tax on or before the 20th day of each calendar month when they make their reports. From this it follows that defendant is liable for the tax, according to the theory advanced by counsel for the State.

In addition to all other claims, the State is demanding from defendant $24,580.00, plus attorney's fees thereon, as

penalty for delinquency on approximately 2,000,000 gallons of gasoline sold to the Pan-American Petroleum Corporation. The full amount of the tax on this item was paid by the Pan-American Petroleum Corporation direct to the State, but the payments were not made within the time prescribed by law; hence the State's claim for penalty. We reject this claim for the reason that, while it is true the payments were not made within the time prescribed by law, yet they were made, and the State received the entire amount due, and, so far as the record discloses, made no complaint and made no demand for the payment of penalties until the filing of this suit. This claim for penalties is stale. The last of the payments made by the Pan-American Petroleum Corporation were made something over two years prior to the filing of this suit. The State has lost nothing. This court has repeatedly held that penalties in civil actions are not favored by the courts. Massachusetts Protective Assn. *v.* Ferguson, 168 La. 271, 121 So. 863; Crowe *v.* Equitable Life Assurance Society, 179 La. 444, 150 S. 52; Turner *v.* Metropolitan Life Ins. Co., 189 La. 342, 179 So. 448.

It has been held by the Federal courts, in effect, that the receipt of the tax by the tax-collecting authorities, though the payment be made after the time for making it lapsed, was a waiver of the penalties. Boswell *v.* City of Washington, 2 Cranch, C. C. 18, and McHenry *v.* Alford, 168 U. S. 651, 42 L. Ed. 614, 18 Sup. Ct. 242.

As to the amount due the State, it claims that defendant failed to pay the state tax of 5¢ per gallon on 1,544,105.27 gallons of gasoline. Defendant admits that it failed to pay the tax on 1,611,107 gallons, but it claims that no tax is due on this gallonage because it was lost by evaporation, which item of loss, it is argued, is not included in the 3 per cent allowance to cover losses in handling. We have rejected that theory, our opinion being that the 3 per cent allowance was intended to cover all losses in handling. It is clear, therefore, that defendant admits delinquency on more gallonage than the State is claiming. In computing the amount of the tax due, we must adopt the State's figures. The state claims also that defendant failed to pay the parish

tax of 2¢ per gallon on 699,922.18 gallons of the total gallonage. Since the defendant owes the State tax, it owes the parish tax also.

The State tax of 5¢ per gallon on 1,544,105.27 gallons amounts to $77,205.26. The parish tax on 699,922 gallons at 2¢ per gallon amounts to $13,398.44, or a total tax of $90,603.70. The 20 per cent penalty on this total amounts to $18,209.74, or a total tax and penalty of $108,813.44. Ten per cent attorney's fees amounts to $10,881.34. This, added to the above total, makes a grand total of $119,694.78. In addition to the above, the State claimed $1,029.79 as tax of 1¢ per gallon on 102,975 gallons *or* kerosene used as tractor fuel, plus penalties and attorney's fees. The trial judge found that defendant owed $611.51 under this item and rejected the State's claim for the balance. The defendant now admits that it owes this amount. The tax, plus 20 per cent penalty and 10 per cent attorney's fees, amounts to $733.81, which, added to the total of other items, brings the total amount due by defendant to $120,438.59. The judge held that plaintiff had failed to make out its case on the kerosene item for more than $611.51, and we find his ruling to be correct.

For the reasons assigned, the judgment appealed from is reversed in so far as it awarded to the State penalties on the gasoline sold to the Pan-American Petroleum Corporation, and the State's demand for such penalties is rejected; and the judgment in favor of the State and against the defendant in other respects is amended by increasing the total amount thereof to $120,438.59, with interest from judicial demand, and as thus amended it is affirmed, defendant to pay costs.